



BOARD OF SUPERVISORS

INSTITUTE OF GOVERNMENTAL
STUDIES LIBRARY

DEC 3 1976

UNIVERSITY OF CALIFORNIA

THOMAS H. BATES
SUPERVISOR, FIFTH DISTRICT

June 14, 1976

To The Members of the Board of the Bay Area Air Pollution Control District:
AN HISTORICAL BACKGROUND TO THE FLYNN HEARINGS AND A BLUEPRINT FOR POSITIVE ACTION.

Honorable Members of the Board:

We have just concluded a major chapter in the history of the Bay Area Air Pollution Control District that has come to be known as the Flynn hearings. Charges were brought to this Board against the District and its Chief Executive, Mr. D.J. Callaghan, more than a year ago last March by one of the District's engineers, Mr. Nathaniel Flynn. We spent more than 168 hours in hearings examining those charges, and generated more than 5,000 pages of transcript in the process. On May 19, 1976, after three additional days of hearings, the Board found, on a vote of 12 to 5 with one abstention, that Mr. Flynn's charges are "without merit."

Considering the gravity of the charges and the time devoted to them, this summary dismissal of the charges is neither sufficient nor satisfactory as a response. As a conscientious member of this body I feel compelled to submit some explanation of my position in dissenting from the majority view and to call upon the Board to at least give the courtesy of a majority response and to at best take some positive and remedial action.

It is difficult for anyone not intimately involved to keep track of the activities of this or any governmental body. There has been substantial turnover on this Board since July of 1970 (see Attachment A). Only three of the original Directors from that time are still serving. For the three Northern counties which joined the District in July of 1971 three more are still serving. But some counties have had as many as six different representatives each in six years. Four members have just recently left or are leaving in the immediate future. Three more will be leaving in January. A couple more are up for election and three are new enough to have missed the beginning of the Flynn hearings. This constant turnover has made it difficult for the Board to fulfill its responsibilities in controlling the District. For the benefit of the Board and the public I will attempt to put the Flynn hearings in some historical context.

Bates, Thomas H.

[CA. Bay area air pollution control
district]

Air pollution

SF bay area

77 00488

INSTITUTE OF GOVERNMENTAL STUDIES LIBRARY
109 PHILOSOPHY HALL
UNIVERSITY OF CALIFORNIA
BERKELEY, CA 94720

INSTITUTE OF GOVERNMENTAL
STUDIES LIBRARY

DEC 3 1970

UNIVERSITY OF CALIFORNIA

This period, since 1970, has been characterized by continual strife. There has been a succession of internal controversies and external criticisms. A few of these have resulted in serious incidents and some have produced major documents. What is needed is an overview of the repeated charges and the responses, and more importantly a thorough review of the recommendations and actions taken as a result. For example, in 1973 Jean Siri inquired about the statute of limitations expiring on violation notices issued by the District. J.D. Callaghan, in a letter dated May 25, 1973, responded: "In fact, we are so streamlining our procedures at this time that we feel certain that action on most violation notices which are recommended for penalty action will take place within a 30-day period from the date of issue." In November of 1975 Raimi and Hofweber noted that violation notices were typically issued five months after the excess occurred. In their sample, the statute of limitations had expired on 4% of the violations. They also noted that there were no explanations in the records for 8.7% of the notices despite seven levels of administrative review. The staff response in Milton Feldstein's memo of December 1, 1975 was that the problems were "not chronic but occasional". In 1976 the Air Resources Board's Enforcement Program review cited "excessive delays in prosecution of violations."

Given my limitations of time and resources, a comparison of each criticism of the district with the recommendation and response made by the district and the subsequent results has not been possible. Nevertheless, I will attempt to present an outline of past events that may put present circumstances in better perspective.

The following incidents are important in understanding the turbulent history of the Bay Area Air Pollution Control District. A more detailed explanation of the issues involved is contained in Attachment B.

Walker 1971-72

District Counsel Matthew Walker raised charges of favoritism, laxity and lack of commitment to effective enforcement against D.J. Callaghan and the District. He subsequently resigned.

Groth and Jelavich March 1972

Board Member William Jelavich and Advisory Council Member Edward Groth submitted to the Board ten general charges against D.J. Callaghan and a 66-page "Bill of Particulars" in support of those charges. The Board dismissed the charges.

Cresap, McCormick and Paget August 1972

This management consultant study of the District was commissioned by the Board of Directors. It was most modestly stated in its suggestions for improvement and enhancement of the District Program. The majority of the recommendations have never been implemented.

Fong Hearings December 1972

Assemblywoman March Fong, as Chairperson of the Assembly Committee on Environmental Quality, conducted two days of hearings pursuant



Digitized by the Internet Archive
in 2025 with funding from
State of California and California State Library

<https://archive.org/details/C123318099>

to House Resolution No. 39 introduced by Assemblyman McAlister calling for an investigation of the District. The hearings were never completed because the committee was abolished in the midst of its proceedings.

Mage January 1974

Dr. David Mage, a professor of Engineering, submitted a critique to the Board of the District's enforcement program upon leaving as a member of the Advisory Council in which he stated that "the staff has an almost perfect record of squelching every suggestion I have made regarding monitoring control and implementation plans."

Flynn Hearings 1975-76

Charges which initiated as a grievance by Nathaniel Flynn, one of the district's engineers, developed into an extensive, although at this point inconclusive examination of the District.

Blinder 1975

Dr. Martin Blinder, a former representative on the Board from Marin County, submitted a minority opinion on the Flynn Hearings when he left. He indicated that at that point he felt Flynn's allegations were unproven, but was highly critical of the District and especially the Board. He was cynical about the possible outcome from a "politically trisected Board of Directors, a third of whom seeks forceful and creative ways of combatting pulmonary smut, a third of whom naively assume an industry position on the issues to be forthright and accurate, and a third of whom hasn't the slightest idea what the true issues are."

Raimi and Hofweber November 1975

Two law students, Diane Raimi and Tom Hofweber under a grant from the Youth Project, the San Francisco Foundation and Law Students Civil Rights Research Council, conducted a highly critical review of one segment of the Enforcement Program, the sulphur dioxide regulation.

Council on Economic Priorities 1975

This is another independent critical review of the District's enforcement program, "Cracking Down Oil Refining and Pollution Control".

Air Resources Board 1976

The most recent examination of the District's enforcement program, in two volumes, finds "serious deficiencies in the District's enforcement procedures" however they are "far superior" to those of the Los Angeles County Air Pollution Control District. This mixed review was treated as a compliment by some and as an insult by others. Action on the recommendations is still pending.

The exchange of charges and denials that has characterized this period has not been productive. This is not to say that progress has not been made, in spite of, and even in some cases because of, the controversies which have surrounded the district. But the overall impact has been negative. Too many of the consequences predicted by Mr. Jelavich in his memo of January 20, 1972 to the Board have been realized. The District has suffered from bad press. Its position has been construed as an endorsement of soft-pedalled enforcement. Each vehement denial invites more strident attacks. Public confidence has declined as has staff morale. The divisive effect of continued confrontation has taken too much time and energy away from the development of an effective pollution control program. These conditions are not fatal but they will continue to damage the District as long as they remain uncorrected.

In all fairness, it must be admitted that some of the charges have been exaggerated. But too many questions remain unanswered, too many procedural problems unresolved, and too many of the valuable suggestions unimplemented. The issues have been repeated over the last six years because they remain essentially the same. The accusations have been that the District has acted as a "handmaiden" to industry to minimize the costs of pollution control, when it should have been a "tough cop". The charge of "handmaiden" has been vigorously denied, but the role of "tough cop" has never been accepted. The question remains whether the District is a more or a less effective persuader against air pollution.

It is time for a constructive effort to put this conflict behind us. The Board of Directors is not a jury whose sole responsibility is to determine guilt or innocence. It is the policy body of a governmental agency charged with the protection of the health and safety of the residents of the Bay Area. Air pollution is a crime, on a daily basis no more than a public nuisance, but over long periods of time it is a crime of violence that threatens the life, health and safety of the entire community.

In its summary dismissal of the charges, the Board has not adequately fulfilled its responsibilities. To say that the Board members have come to a conclusion does not mean that the issues have been resolved. At the least, the Board ought to respond specifically and individually to the allegations which have occupied so much of our time and attention. But more than that the Board must acknowledge its responsibility for the policy and the conduct of the District, and take positive steps to correct the deficiencies which have been revealed. Unless the Board is willing to implement some of the changes necessary to improve the performance of the District we will continue to suffer internal conflict and public criticism.

The responsibility of the District is to protect the public and control air pollution. There are two major changes that are necessary to fulfill that responsibility more effectively. The first is to replace D.J. Callaghan as Air Pollution Control Officer. But that alone is not sufficient unless the Board is also willing to devote the time necessary to reorganize itself and the staff and revise the District's procedures and practices in accordance with some of the proposals which have been made and repeated over the course of the last six years, as follows:

A. Decentralize Authority in the District

1. Eliminate the office conference altogether in relation to abatement proceedings and variances. These are pro-

perly the function of the Hearing Board, not of the administration.

2. Have the District Counsel report directly to the Board of Directors rather than to the Air Pollution Control Officer. His legal opinion should not be restrained through any administrative channel.
3. Enhance role of Advisory Council. Develop closer liaison and involve more extensively in development of regulations and review of program.
4. Adopt permit review procedure by Board of Directors on major direct source applications for Authority to Construct and Permit to Operate. If there is a question of legality then we ought to request an opinion from the Attorney General.

B. Revise Enforcement Procedures

1. Streamline process for violation notices. Presently each violation notice must go through seven levels of administrative review before penalty action is sought, from field inspector to Air Pollution Control Officer.
2. Develop implementation schedule for in-stack monitoring as an enforcement tool. This component of the program is long overdue.
3. Repeal Upset/Breakdown rules. These events should not be exempt from emission limitations. Operators should be required to apply for variance for scheduled maintenance.
4. Revise schedule of fines in proper proportion to excesses so that backyard burners do not pay more than industrial polluters. Eliminate wholesale discount settlements of repeated violations.

C. Reorganize to Strengthen Board of Directors

1. Develop program control through program budgeting and audit review.
2. Establish a long-term planning process separate from Research that involves the Board in setting goals and objectives for the District. Progress on plan should be related to the annual budget cycle.
3. Improve reporting to Board both in preparation of agenda and on Board referrals. The quality of the Board's decisions depend on the quality and availability of information.
4. Review committee structure to improve effectiveness of individual Board member's involvement.

5. Adopt affirmative action plan and revise personnel practices.

As long as D.J. Callaghan remains in office the present pattern of strife is likely to continue. Just as it would be insufficient to replace him unless the policies were also changed, so the reverse is true. He has been the central target of the attacks upon the District. The Board, the staff and the public have been polarized by his actions.

In the course of Callaghan's testimony before the Board he has been either unable or unwilling to answer numerous questions. Too many times he has said, "I don't know, but I'll be happy to get a report" or "I don't recall, but I'll have staff check the records." The Board's experience with referrals for information has been disappointing. The responses have been slow, and in some cases non-existent. These delays have been a major obstacle in the investigation of the District by the Board. This pattern alone represents a telling indictment of Callaghan. Whether this is deliberate or not is immaterial. While neither poor memory, nor ignorance, nor unresponsiveness to inquiries from the Board are criminal offenses, they are hardly desirable characteristics in the chief administrative officer of a multimillion dollar public agency.

Callaghan's strongest administrative trait has been his ability to outlast his critics. But eventually the accumulation of the weight of the criticism which has been brought against the District must result in his dismissal. If not, then the Board of Directors must be held accountable.

Therefore, for the reasons stated above, and based on the materials attached, I recommend that the Board of Directors:

1. Designate a committee to review the transcripts of the final three days of hearings on May 13th, 14th and 17th of 1976 and other pertinent documents, in order to prepare a response to each of the eight allegations brought by Mr. Flynn.
2. Act to remove D.J. Callaghan from his position as Air Pollution Control Officer and request the Personnel Committee to initiate the search for a replacement.
3. Approve in principle the proposals contained in this letter for decentralization, revision and reorganization and direct the Executive Committee and the Advisory Council to prepare implementation plans for each proposal to be scheduled for consideration on the Board's agenda.

Very truly yours,



Thomas H. Bates

BOARD OF DIRECTORSAttachment A

Original Six Counties

<u>County</u> <u>Board Members</u>	<u>Serving Since</u>	<u>Current Status</u>
Alameda:		
GERTON	7/1/70	no longer serving
SWEENEY	7/1/70	
BORT	2/5/71	
PLOWRIGHT	6/19/72	no longer serving
*BATES	7/3/74	leaving 1/1/77 - Current Member
*DICK OLIVER	6/1/76	New Member
Contra Costa:		
HOYER	7/1/70	no longer serving
*KENNY	7/1/70	original appt. - currently serving
*LANCE	1/8/76	new member
Marin:		
GROSS	7/1/70	no longer serving
HICKS	7/1/70	no longer serving
*ARRIGONI	4/1/71	leaving 11/1/77 - currently serving
FRASER	7/17/72	no longer serving
BLINDER	6/1/74	no longer serving
*CULLEN	5/1/76	new member
San Mateo:		
HIESTER	7/1/70	no longer serving
ST. CLAIR	7/1/70	no longer serving
*FASSLER	1/22/75	leaving 1/1/77 currently serving
ST IENKAMP	7/17/72	no longer serving
*MARGUARITE LEPZIG	6/1/76	new member
San Francisco:		
FEINSTEIN	7/1/70	no longer serving
*TAMARAS	1/22/73	original appt. currently serving
ALIOTO	1/22/73	no longer serving
*NELDER	3/7/74	current member
Santa Clara:		
CALVO	7/1/70	no longer serving
*JELAVICH	7/1/70	original appt. - leaving right away
*MCCORQUODALE	1/8/75	currently serving

THESE COUNTIES JOINED DISTRICT ON
7/1/71

<u>County</u>	<u>Serving Since</u>	<u>Current Status</u>
Napa:		
PEATIMON	7/9/71	no longer serving
TRAWER	7/9/71	no longer serving
AQUILA	7/17/72	no longer serving
TUTEUR	4/10/73	no longer serving
*GORE	6/1/74	currently serving- leaving right away 8/76
*CHAPMAN	3/26/75	current member
Solano:		
SCOFIELD	7/9/71	no longer serving
*LEMONS	7/9/71	original appt.- still serving
*HILLYARD	7/24/75	new member - leaving 1/1/77
Sonoma:		
*POZNONOVICH	7/9/71	currently serving original appt.
*THEILLER	7/9/71	currently serving original appt.

Note: (*) members currently serving

2 from each county serve at any one time.

2 members leaving right away

4 leaving 1/1/77

5 new members after close of first round of Flynn Hearings.

HISTORICAL BACKGROUND

- I. Introduction
- II. Enforcement
 - A. Monitoring -- ISM vs. GLM
 - B. Evaluation
 - C. Violation Notices
 - D. Abatement
 - E. Variances
- III. Communication
- IV. Personnel
- V. Organization
- VI. Previous Charges Against D. J. Callaghan
- VII. Disposal of Criticism
- VIII. Conclusion

I. Introduction

The Flynn hearings raised serious charges against the Bay Area Air Pollution Control District's operations. These are neither the first criticisms of the District nor the most recent. District Counsel Matthew Walker (1971), the Groth & Jelavich Bill of Particulars (1972), the Cresap, McCormick and Paget Report (1972), the Fong hearings (December 1972), the Mage Report (1974), the Flynn hearings (1975), the Blinder Minority Report (1975), the Raimi and Hofweber study (1975), the Council on Economic Priorities Report (1975) and the 1976 Air Resources Board reports reveal an extremely turbulent history of the District. The issues that will be explored here aren't new. There are those who will question why the charges are raised again and again. The answer is because they are still relevant and unresolved.

These criticisms come from both within the ranks of the District and from outside. While some deal with other problems of the organization, the primary concern is the enforcement program of the District. In the final summation presented for Nathaniel E. Flynn, his counsel pointed to the central issue of the grievances. The District was not playing the role of a "tough cop" in air pollution control. All eight allegations support this general charge. The District has at various times been accused of favoritism, laxity, lack of commitment and lack of enthusiasm for its mandate. The District's defense has been that it acts as a "persuader" seeking to secure compliance with District regulations through cooperation with industry. But if the District is indeed supposed to be a "tough cop" then these allegations contain much "merit".

Mr. Flynn is not alone in his contention that the District acts in too lax a manner toward polluters. Testimony received during the Fong hearings again and again raised this point. "We think the District is nothing more than a big public relations firm for the heavy industries in the Bay Area" (Neil Rich testimony, Fong hearings pg. 73). Ned Groth, a former member of the Advisory Council, stated that "there's been an emphasis on cooperation rather than hard-nose enforcement (Fong hearing pg. 327).

More recently, the Council on Economic Priorities Report, Cracking Down, reiterates this point. Stephen Moody of the Council on Economic Priorities concludes, "it appears the refiners have not exercised the know-how they have so well demonstrated elsewhere in making their refineries as clean as possible, and that local pollution control agencies have been relaxed, inconsistent and only moderately effective" (Council on Economic Priorities press release December 15, 1975). Finally, the Air Resources Board staff found "a number of serious deficiencies in the District's enforcement procedures..." (Air Resources Board Review of Bay Area Air Pollution Control District Enforcement Program February 1976 pg. 1).

II. Enforcement

In a memo to the Board of Directors dated December 10, 1971, in response to criticism from District Counsel Matthew Walker, D. J. Callaghan stated, "We are aware of the charges that a major corporation might feel that such assessments constitute a pollution licence--that is they could include penalties in their cost of doing business and otherwise ignore air pollution controls." It would be extremely naive to think that this is not the case. Contrary to Callaghan's claim in the same memo that "the result (of office conferences) is that most violation notices lead to compliance without the necessity of penalty or formal abatement action," the effect has been to lower the cost of a "pollution licence." Whether or not compliance has been achieved is disputable. Callaghan cites in the same memo settlements of a few firms in support of his contention. A comparison of some of those with the most recent report from District Counsel to the Air Pollution Control Officer is revealing:

Violation Notices	1970	1971	Pending 1976	Closed as of 5/21/72
Allied Chemical	10	5	21	0
Fibreboard	3	3	10	0
Shell Oil	9	13	26	0

The situation remains that the District has not used the enforcement tools available to it to their fullest extent. The maximum fine of \$6000/day has never been levied, nor are misdemeanor citations issued as recommended by the Air Resources Board. Wholesale settlements of violation notices further discount the "pollution licence."

The issues of enforcement can be divided into more specific categories:

A. Monitoring -- Instack Monitoring (ISM) vs. Ground Level Monitoring (GLM)

The District's reluctance to require Instack Monitoring has been a major argument for several years. Flynn's 2nd allegation concerns Instack Monitoring at Standard Oil, asking why the District did nothing when Standard refused the District's request for Instack Monitoring installation. The District's acceptance of Standard's statement as to the infeasibility of such a project is questionable. From other documentation, the District does not seem to have actively pursued Instack Monitoring at any time. In fact, the District Air Pollution Control Officer claims to have thought his authority to demand Instack Monitoring was effective in November 1971 rather than November of 1970. (Fong hearings pg. 313). The same confusion was raised in the Flynn hearings and is still unresolved.

Ground Level Monitoring measures the quality of ambient air while Instack Monitoring measures the emission of pollutants. As the Raimi & Hofweber study points out, the District Ground Level Monitoring System is unable to distinguish between reduction and dispersion of emissions. No actual rate of emissions is measured thus "the District regulation fails to limit the amount of pollutants a source is releasing to the air. The District's reliance on Ground Level Monitoring allows the degradation of air quality in the Bay Area." It's true that Ground Level Monitoring measures air quality at levels people breath, however, this doesn't show they are a good tool for protecting air quality (Raimi & Hofweber pg. 7). With Ground Level Monitoring, the 465 foot tall Exxon stack in Benecia helps insure that the monitors near the refinery do not detect excess levels.

Nor have the Ground Level Monitors always been most effectively placed. Professor Mage pointed out that the carbon monoxide monitor on the roof of the District Headquarter's 7-story building did not measure the air people breath at street level.

Instack Monitoring and Ground Level Monitoring did not have to be treated as mutually exclusive and competitive systems for monitoring air quality, but they have been treated as such. In March of 1976, the Board finally adopted Instack Monitoring requirements only after years of resistance to pressure.

B. Evaluation

Another specific example of the District's shortcomings in its "tough cop" role regards their failure to get sufficient information for enforcement and evaluation purposes. As corroborated by the Air Resources Board report, Flynn alleged that the Standard Oil Sulfur Recovery Permit 330 was granted without sufficient information hence incomplete evaluation.

"The District accepted an incomplete application for authority to construct and was unable to properly evaluate it within the 60-day time limit.... The Director of Engineering and the Chief of Permit Services claimed that the application was evaluated, but this program review, as well as a hearing conducted by the District's Board of Directors, failed to find anyone who would admit to performing actual calculations to determine the source's potential for compliance with the District's Rules and Regulations." (Air Resources Board Program Review Case No. 8 pg. B73-76).

The Air Resources Board report likewise supports Mr. Flynn's allegation concerning Union/ Collier Company. In regards to the source test run on September 27, 1972, the Air Resources Board staff found that it was not conducted "according to accepted methods and, therefore, left room for doubts as to the accuracy of the test and the compliance status of the source." Further, "the long period of time between the doubted source test and the next test (4 months) shows that the District's source test program is not as responsive as it should be. Again, it is difficult to understand why the first source test was not performed properly." (Air Resources Board Program Review pg. B-36-37).

Regarding Service Station Applications (Flynn Allegation No. 5), the Air Resources Board confirmed, "A careful inspection of each source had not been made prior to issuance of a permit to operate." (Air Resources Board Program Review pg. IX).

Besides corroborating some of Flynn's allegations, the Air Resources Board review found insufficient data collection or documentation on the part of the District regarding: Emissions Inventory, Air Monitoring and Laboratory Facilities. (Pg. X).

C. Violation Notices

A further determining factor in the "toughness" of enforcement is the issuance and settlement of violation notices. At the time of the Fong hearings, Ms. Fong was supplied with information stating that 86% of violation notices served by the District do not result in penalty action. Perhaps a reason for this can be ascertained from Mr. Callaghan's comment at those same hearings: "Violation notice is nothing more than a warning---a citation" (Fong hearing pg. 283).

The 1976 Air Resources Board report also commented on the "excessive number of violation notices on which no penalty action was taken." This represented 43% of violation notices, a substantial difference from 1972, but the procedural difficulties remained the same with seven levels of administrative review and ultimate authority resting with Callaghan to pursue violations, while any level could decide to take no further action. The Air Resources Board recommended a reduction in the time for violation notice review and a review of "no further action" policies. More than 4% of violations expired under the statute of limitations, yet in spite of all the staff attention 8.7% of actual violations could not be accounted for in the records. The staff response to Raimi & Hofweber acknowledged this as "troublesome"!

A more damaging criticism concerning violation notices involves large "housecleaning settlements." As Raimi and Hofweber point out, "Ironically, even though the District's policy is to pursue more severe penalties for repeat violations, these settlements gave cheaper 'wholesale' treatment to the largest and most frequent polluters in the District". (Raimi & Hofweber pg. 6). The response was that this is not "general practice" (Feldstein memo). However, in the case of Phillips Petroleum this appears to have been repeated practice. One hundred violation notices from 1972 and 1973 were settled for \$13,000 total or \$130 per violation notice. Again one hundred sixty-eight notices to Phillips from 1974 and 1975 were settled for \$20,000 or \$119 per violation notice. There are now 55 more violation notices pending against Phillips. Not only were these settlements cheaper than the possible maximum penalties, but they were considerably cheaper than the cost of installing corrective equipment.

D. Abatement

The District's hesitance to seek abatement orders also reinforces the "permitter" of pollution image it now holds in many eyes. The Air Resources Board report finds fault with this reluctance and urges greater use of abatement orders. It is District's policy to consider an abatement order to any point source to having 3 or more violation notices in 1 year. "The staff noted that abatement order proceedings are often discontinued, however, as a result of commitments made by the source operator at an office conference with the District. The District thus appears to bypass the Hearing Board in these cases." (p. X) In view of this the Air Resources Board recommends that the Hearing Board not the District should properly make these decisions.

In fact, only five accusations have been filed with the Hearing Board since January 1, 1974, seeking abatement orders. This is not for lack of violations. There are currently (Powell memo May 21, 1976) twenty-five firms with three or more violation notices pending.

Of the five which have been filed, three were issued orders for abatement, one was withdrawn by the Air Pollution Control Officer and in the last against Phillips Petroleum the District stipulated to a variance application. This was done at a time when Phillips was under anti-trust action and was soon required to divest itself of the Avon Refinery.

E. Variances

The present grant of variances was also criticized in the Air Resources Board report. In discussing deficiencies in the Up-set/Breakdown Rule, the staff noted that "The provision concerning scheduled maintenance essentially provides for administrative variances. This is in conflict with the Health and Safety Code which provides that only the Hearing Board may grant variances." (Enforcement Program pg. VIII).

Secondly, the Air Resources Board found that the District was not regularly checking up on all the increments of progress in the variance orders to be certain that they have been met. The Phillips variance was revoked in April of 1976 even though staff had been aware for months that they were behind schedule. The new owners of the Avon Refinery, TOSCO, have assumed responsibility for compliance, but there is no written agreement and no compliance schedule.

Several witnesses commented on District variance policies during the Fong hearings. Stephen Williams of the Air Conservation Council of Northern California, believed public health effects played a very minor role in variance granting. (Fong hearings pg. 113) Mr. Blackman of the California Public Interest Law Center, believed that Mr. Callaghan supports the variances in most instances adding that he thought the numbers of variances sought and granted were nearly identical (Fong hearings pg. 53).

III. Communication

The problems of enforcement are compounded by chronic problems of communication amongst the Board, the staff and the public. The Cresap, McCormick and Paget report, a management study commissioned by the Board details these difficulties quite thoroughly. While the style is stilted in the manner typical of consultants the observations and recommendations are quite lucid. It ought to be mandatory reading for new Board members.

Of great concern in the Cresap, McCormick and Paget report, and to at least some members of the Board are the communication problems between the Board and the staff. Here the findings of the Cresap, McCormick and Paget report corroborates testimony received at the Fong hearings. Responsibility for communication flow ultimately rests with the Air Pollution Control Officer, Mr. Callaghan. According to the Cresap, McCormick and Paget report, the Board of Directors "is not provided with suitably arranged and focused information." (Cresap, McCormick and Paget II-2) Bluntly put, the information presented to the Directors discourages examination of the contents. An unwillingness on the part of the staff to provide information before the meetings was indicated at the Fong hearings. (Jelavich testimony pg. 129) Cresap, McCormick and Paget determined that the referral system (requests for information from the Board to the Staff) was a source of frustration to the Directors due to delays and occasional seeming 'disappearance of a referral item.' (Cresap, McCormick and Paget IV-21).

The referral problem seems to be as yet unresolved. The Instack Monitoring report requested by the Board on April 2nd of 1975 is still not available.

Cresap, McCormick and Paget also maintained that the public information and education program conducts itself in an unnecessarily defensive manner. While improvements in this area have been made, the Cresap, McCormick and Paget observation that the District stimulates criticism by not constructively relating to outside groups believed by some to be hostile is still true. (C,M,&P, VI-28). When questioned on public contact with the District, Mr. Callaghan stated "...I guess there is a hesitance on their part (the public's) to talk to us." (Fong hearings pg. 292).

Both the Cresap, McCormick and Paget report and the Raimi & Hofweber Study found weaknesses in the communication between departments in the District. (Raimi & Hofweber pg. 7, Cresap, McCormick and Paget, II-3) After noting delays, discrepancies and sometimes no explanations for decisions in records Raimi & Hofweber concluded it "does little to help the District clear itself of allegations of favoritism and, in fact, may invite suspicion." (Raimi & Hofweber pg. 7) The report stated that significant discontent within certain staff classifications and in some divisions of the organization can be traced (in part) to "the overly centralized authority patterns and communication roadblocks." (Cresap, McCormick and Paget pg. 11-3).

IV. Personnel

With regards to personnel matters within the District it is most difficult to keep personalities out of it and indeed they often play a prominent role in the issue. The Cresap, McCormick and Paget report discovered among the staff that whim and favoritism play a definite role in the promotion and recruitment process. (Cresap, McCormick and Paget VI-16). Secondly, they found that very few personnel grievances ever reached the Air Pollution Control Officer (with a notable recent exception) which supports the notion that the grievance process isn't considered worthwhile by staff members. (Cresap, McCormick and Paget VI-18). The employees are not protected by a civil service system. Thus, the Air Pollution Control Officer who himself is supposed to be in a position to resolve personnel grievances has himself been embroiled in clashes with other staff, dating back to his confrontation with Matthew Walker.

V. Centralization

The Air Pollution Control Officer occupies a highly centralized and authoritarian position in the District. Over the years the power over all of the functions of the District have been concentrated in the hands of a single individual. He funnels information to the Board, recommends action, appointments and policy to the Board, and is the final decision maker on when to seek action on violations, among other things. The Cresap, McCormick and Paget report criticized the "too great a burden placed on the Air Pollution Control Officer" (Cresap, McCormick and Paget pg. II-2) which is polite management consultant terminology for too much power concentrated in one person. Specifically, they observed and recommended that:

1. Any administrative policies promulgated by him should only be recommended by him to the appropriate Board committee. (III-13)
2. The Air Pollution Control Officer should not have "key role" in determining committee memberships (IV-7)
3. The Personnel Committee should concur with appointments of Air Pollution Control Officer for persons directly reporting to him
4. The Air Pollution Control Officer should not prepare Board agendas, so that separation of roles and inclusion on agenda of all matters desired by individual Board members can be assured. (p. IV-20)
5. Air Pollution Control Officer's practice of editing the Board minutes should be abolished (p. IV-24)
6. Reliance on Air Pollution Control Officer as major communication link between the Board and the Advisory Council should not be continued (again for maintenance of separation of roles). (p. V-6)
7. District Counsel should not report to Air Pollution Control Officer since advice (to the Board) may be logically opposed to a strategy proposed to the Board by the Air Pollution Control Officer.

Additionally, Cresap, McCormick and Paget concluded that the "overcentralized authority" adds to delays in internal communication and decision-making and to lack of "formal communication emanating downward from the Air Pollution Control Officer." (pg. VI-2).

Of these recommendations, only the fifth one regarding editing of the Board's minutes has been implemented.

VI. Previous Charges Against D. J. Callaghan

It is not too long a leap from discussing the authority concentrated in the Air Pollution Control Officer, to the man who has held that position for nearly fifteen years, D. J. Callaghan. He is responsible for the administration of the District. While not all of the criticisms of the District have been of him, or within his control, some of them have been aimed directly at him, and rightly so.

In 1972, ten charges were brought against Mr. Callaghan accompanied by a 66 page Bill of Particulars. Mr. Jelavich (present Chairperson) and Ned Groth (Advisory Council) authored the document. Briefly, he was accused of: delaying the development of regulations for 2-3 years; giving one-sided information to the Board in areas influencing policy decisions; failure to provide required staff reports; bias toward industry; insensitivity to citizen concerns and efforts to prevent participation of environmental groups; stifling and restraining staff action and rewarding loyalty and obedience; dismantling checks and balances; and responding only to the minimum extent required. (See Charges Against D. J. Callaghan: Bill of Particulars and Fong hearings pg. 145-150).

It is acknowledged that the Board of Directors did not accept the validity of these charges. However, the circumstances of their dismissal may shed light on the validity of the Board's denial of the charges.

On March 1, 1972, Mr. Jelavich was prepared to bring the charges against Mr. Callaghan in open session of the Director's meeting. However, an executive session was called that day so no public announcement was made by Mr. Jelavich. However, the press broke the story and the next day Mr. Callaghan went to the media and categorically denied the charges as vicious lies. On March 15, 1972, Mr. Jelavich wrote a letter to the Board asking for their careful study of the charges. Month after month passed and no response was made by Mr. Callaghan. Finally, a request for the charges and their response by Ms. Fong's Assembly Committee on Environmental Quality got things moving. First the Chairman of the Board claimed that Mr. Callaghan was forbidden from responding. Then the Board ordered Mr. Callaghan to respond in 6 weeks, due on Thursday, November 30th. On that day the reports were late so they had to be delivered to each Director's home that night rather than distributed at the meeting in San Francisco. On Friday, an executive session was scheduled for the following Wednesday to decide the matter. The hastiness of the meeting date precluded adequate examination of the charges and responses. A thorough investigation of the two documents would take a substantial amount of time, something that busy people are hard pressed to find in four days.

On December 6, 1972, the Executive Session met and not a single charge was discussed.

The Board opted for dropping the items, resolving the matter in a hurry. After a straw vote was taken it was over, really before anything had begun. (Fong hearings pg. 135-141).

VII. Disposal of Criticism

Unfortunately, these have not been the only criticisms of the District and specifically the Air Pollution Control Officer to be shunted aside. Action was postponed on the CRESAP, MCCORMICK and PAGET REPORT even though nothing else was on the agenda. It was referred to Executive Committee which met 2 times in 4 months to discuss it. The staff dissenting report was given considerably more attention.

The Fong hearings on the Air Quality in the Bay Area and operations of Bay Area Air Pollution Control District were never completed. Before the third hearing, March Fong, Chairperson of the Committee, was removed. As Ms. Fong said at the close of the December hearing (without knowing of her removal) "The hearing record will remain open indefinitely" (Fong hearings pg. 333).

The Flynn hearings opened their final sessions on Thursday, May 13th, 1976. That day and the next, the Board had the opportunity to question any staff members. Mr. Callaghan was called to the stand to respond to issues raised during the Flynn hearings. Although it had been agreed during those hearings that the questioning at the end would not be so limited, the Board voted on Thursday to limit questioning to Flynn's 8 allegations.

Thursday afternoon and all of Friday, questions were directed to Mr. Callaghan by members of the Board. Despite a large number of very different questions, the answers were remarkably alike. Over and over again Mr. Callaghan declined from answering. "I don't know", "I have to check the record." "I have to refresh my memory" "I don't recall." "Refer to technical staff."

Granted some of the questions may have been too specific or technical, yet surely the Air Pollution Control Officer, with 15 years on the job, ought to be familiar with the program. But the Board members did not care what the answers to the questions were, nor did they care to wait for some pro forma reply. They were prepared to vote and be done with it.

VIII. Conclusion

To dismiss Flynn's allegations in six sentences after more than a year of review is in many ways more frustrating and less helpful than it would have been to dismiss them after the first ten minutes. As long as the Board is unwilling to consider the Flynn charges individually and confront the issues, then it's unlikely that Callaghan will be removed, or that the Board will assume its proper responsibility, or that the situation of the District will improve substantially, or that the air will get cleaner.

Yet there are issues vital to air pollution control in the Bay Area which are still pending. The Instack Monitoring program has not begun. The question of whether the District is granting administrative variances to major polluters through office conferences remains to be decided. The permit procedures for review of new major direct sources of air pollution still are under the control of a single individual.

D. J. Callaghan has been a roadblock to the development of a strong air pollution control program. I am convinced that he has shown himself to be more interested in maintaining the cooperation of industry than in obtaining compliance with the District regulations or developing tougher regulations. I am not convinced that the cooperation of industry is either the most effective or the most expeditious route to either compliance or clean air.

I for one would prefer the District to be criticized for its excessive zeal in pursuing its mandate; but that will never be the case as long as D. J. Callaghan is Air Pollution Control Officer.

References

1. Air Resources Board Review of the Bay Area Air Pollution Control District-Enforcement Program, February 1976.
2. Air Resources Board Program Review Bay Area Air Pollution Control District, March 1976 - Division of Implementation and Enforcement subvention Administration Unit (Preliminary Draft).
3. Council on Economic Priorities Cracking Down Oil Refining and Pollution Control, 1975.
4. District Response to Council on Economic Priorities, December 12, 1975.
5. Cresap, McCormick and Paget Inc. August 1972 - Bay Area Air Pollution Control District - Study of Organization and Administration.
6. Memorandum of Summation - Mark Himelstein, Attorney for Nathaniel Flynn In Re the Grievance of Nathaniel E. Flynn before Bay Area Air Pollution Control District.
7. Final Brief of District - John F. Powell, Counsel. In Re the Grievance of Nathaniel E. Flynn.
8. Groth & Jelavich - Charges Against D. J. Callaghan - Bill of Particulars.
9. Callaghan - Response of the Air Pollution Control Officer to Document Entitled "Charges Against D. J. Callaghan", November 27, 1972.
10. Transcripts of Flynn hearings.
11. California Legislature. Assembly Committee on Environmental Quality. March K. Fong, Chairperson, Proceedings. Air Quality Problems of the San Francisco Bay Area and the Operations of the Bay Area Air Pollution Control District. December 11, 1972 - San Francisco and December 12, 1972 - San Rafael.
12. Callaghan Memo to Board of Directors, December 10, 1971, "Response to Charges on Enforcement Procedures".
13. Jelavich Memo to Board of Directors, January 20, 1972, "Dismissal of Matthew Walker - District Counsel".
14. Dr. Martin Blinder, "Nathaniel Flynn Hearing Opinion", undated.
15. Raimi & Hofweber, Bay Area Air Pollution Control District's Pursuit of Penalty Action Against SO₂ Polluters, 1975
16. Feldstein Memo to Board of Directors, December 1, 1975, "Staff Response to Presentation made by Ms. Raimi and Mr. Hofweber".
17. Dr. David Mage, "Valedictory Address," January 9, 1974.

77 00488

U.C. BERKELEY LIBRARIES



C123318099

INSTITUTE OF GOVERNMENTAL STUDIES LIBRARY
109 PHILOSOPHY HALL
UNIVERSITY OF CALIFORNIA
BERKELEY, CA 94720